IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 63767-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
tineimalo vaitogi taua,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: July 26, 2010
	)	

Lau, J.—Tineimalo Taua challenges his conviction for two counts of first degree robbery. He argues his lawyer was ineffective for failing to request a voluntary intoxication instruction. And in his statement of additional grounds for review, he contends that his attorney was also ineffective in plea negotiations and for failing to object to one of the State's witnesses. But because Taua fails to establish deficient performance or prejudice, we affirm.

FACTS

The State charged Taua with two counts of second degree robbery. After he refused its plea offer, the State amended the charges to first degree robbery. The

charges were based on two robberies at a Kent 7-Eleven store on successive nights that were captured on video tape. The jury viewed the tape several times during the trial, and several witnesses testified about what happened.

Surjit Bhardwat was the sole store employee working on the night of November 6, 2008. He testified that around 1:15 a.m., Taua came into the store, put a bag of chips on the counter, and asked for a package of cigarettes. Suddenly, Taua grabbed him, and two other people came inside and started kicking him. The men took cigarettes and money from the cash register before leaving. Bhardwat later identified Taua from a photomontage as one of the men who assaulted him and robbed the store.

Amandeep Sandhu was the sole employee working at the 7-Eleven the next night. He testified that Taua and two other men came into the store around midnight and asked him for directions. They showed him a piece of paper and when he leaned over to look at it, they grabbed him and started hitting his face. Sandhu testified that when the men began beating him, he offered to open the cash register and give them money. He said Taua responded by hitting him again and demanding, "Open, you son of a bitch." Verbatim Report of Proceedings (May 18, 2009) (VRP) at 244. Sandhu opened the register, and the men began taking the money. They also took cigarettes and beer from the store. After the men left, some customers came inside the store and called 911. Police detained Taua later that night, and Sandhu identified him as one of the men who had robbed the store.

Kent Police Officer Michael O'Reilly testified that he was on patrol on the night of November 7, 2008, when someone in the 7-Eleven parking lot flagged him down and

told him the store had just been robbed. He obtained a description of the suspects and began looking for them. A short distance away, he saw a parked car with a person standing next to the car's open trunk. He saw cigarette packs and a large wad of cash in the trunk, separated by denominations. After more police officers responded to the scene, they detained four people, including Taua. Taua was in the rear passenger seat behind the driver, next to some Budweiser beer.

Taua testified in his own defense at trial. He said that on November 6, 2008, he went to the 7-Eleven store to buy a pack of cigarettes and something to eat. He claimed that when he asked the store clerk for cigarettes, the clerk threatened to shoot him. At that point, Taua said, he grabbed the clerk to defend himself. He explained that he experienced a flashback because someone had shot him several years before. He denied having planned to rob the store with the other two men who assaulted Bhardwat.

Taua testified that on the next night, he went to the 7-Eleven store to purchase beer. He said that the clerk recognized him and threatened to shoot him, so he grabbed the clerk in self-defense. He then had the following exchange with his attorney:

> Q. Were you intoxicated that night?
> A. I was intoxicated.
> Q. Did you know that the store that you were in on November 7th was the same one that you had been in the night before?
> A. I was not aware that was – it was the same store. I wasn't aware of.

VRP at 329–30. He stated that he did not intend to rob the store.

On cross-examination, Taua denied hitting or kicking the store clerk. He

explained that though he appeared to be kicking the clerk in the surveillance video, he was actually kicking at a black object in the clerk's hand that he believed to be a gun. He insisted he had to defend himself. He and the prosecutor then had the following exchange:

> Q. Okay. And does defending yourself mean taking their money?
> A. No, sir.
> Q. So why did you take the money?
> A. Maybe I was mad. Maybe I see the other individual was doing it, went around and do it. But I wasn't thinking. I was not in my right mind at that time. I was mad.

VRP at 336. At another point, when he was asked why he grabbed the clerk, Taua testified, "[A]t that time, I was really intoxicated. I was not in my right mind. I was mad at him for what he said." VRP at 352. Taua admitted to stealing money and beer from the store but insisted, "I didn't rob the guy." VRP at 345.

At no point did Taua testify that his drinking on the second evening affected his memory of what happened. Nor did he testify that he was so intoxicated that he did not realize he was stealing the store's property. Bhardwat, Sandhu, and Officer O'Reilly did not testify that Taua appeared intoxicated. And the store's surveillance video did not show Taua stumble or lose his balance at any point.

In his closing argument, Taua's attorney focused on raising doubt as to whether Taua was an accomplice to the other men.

> Is there really any evidence that he . . . solicited these people? That he commanded these people? That he encouraged these people? That he requested persons to commit the crime? Did he do that? Is there evidence?
> . . . .
> Now, there was a language barrier. There may have been some

> misunderstanding, and it may have led to something that went terribly wrong. Could these other individuals have taken advantage of the situation? Had seen Mr. Taua was in a fight with this individual and jumped in and seized the opportunity? Is it possible? Certainly, it is.

VRP at 405, 407. He also pointed to what he said were inconsistencies in the testimony of the State's witnesses and emphasized Taua's testimony that he did not go into the

store intending to commit a robbery. He also emphasized Taua's stated belief that he acted in self-defense on both nights. And he briefly referenced Taua's claim that he was intoxicated on the second night. But he did not propose a voluntary intoxication instruction.

The jury found Taua guilty as charged. At the sentencing hearing, Taua moved pro se for a mistrial, arguing that he was forced into a trial because the State's plea offer was based on an offender score of six and his attorney was ineffective for failing to discover that his offender score was actually zero. The court rejected this argument and sentenced him within the standard range. He appeals.

ANALYSIS

Taua contends his right to effective assistance of counsel was denied because his attorney did not request a voluntary intoxication instruction. "We review an ineffective assistance of counsel claim de novo." State v. Powell, 150 Wn. App. 139, 152, 206 P.3d 703 (2009). To prove ineffective assistance of counsel, a defendant

must show that his counsel's performance was deficient and that this performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987). There is a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed." Powell, 150 Wn. App. at 153.

A jury may be instructed on voluntary intoxication only if there is substantial evidence that the defendant's drinking affected his ability to form the necessary mental state to commit the charged crime.[1] State v. Gabryschak, 83 Wn. App. 249, 252–53, 921 P.2d 549 (1996). Consequently, a defendant is entitled to an instruction on voluntary intoxication only if (1) a particular mental state is an element of the crime, (2) there is substantial evidence the defendant was drinking, and (3) there is substantial evidence that the drinking affected the defendant's ability to form the required mental state. State v. Gallegos, 65 Wn. App. 230, 238, 828 P.2d 37 (1992). Evidence of drinking alone is insufficient. There must be substantial evidence of the alcohol's effects on the defendant's mind or body. Gabryschak, 83 Wn. App. at 253. Substantial

[1] RCW 9A.16.090 provides, "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state."

evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise. Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

Here, the first two requirements are satisfied. Robbery requires a particular mental state—namely, the intent to deprive the victim of property. State v. Corwin, 32 Wn. App. 493, 497, 649 P.2d 119 (1982); see also State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (the "intent to steal" is an essential element of robbery). And there was substantial evidence that Taua was drinking on the evening of November 7, 2008. For example, he testified that he was "extremely intoxicated," and the police found him with a case of beer. Thus, whether Taua was entitled to a voluntary intoxication instruction hinges on the third requirement—whether there was substantial evidence that Taua was so intoxicated he could not form the intent to deprive the 7-Eleven store of its property.

Taua relies on State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003), in which Division Three of this court reversed the defendant's conviction for assaulting an officer when his attorney failed to request a voluntary intoxication instruction. But in that case, there was substantial evidence that the defendant was "highly intoxicated" and that his extreme level of intoxication affected his mind and body. Kruger, 116 Wn. App at 689, 692. For example, he slurred his speech, swung a beer bottle at a police officer, head butted the officer, vomited, and experienced a "blackout." Kruger, 116 Wn. App. at 689, 692. Every witness testified to his level of intoxication. Kruger, 116 Wn. App. at 693. Pepper spray had little effect on him—a sign of extreme intoxication. And he was ultimately taken to the hospital for evaluation. Kruger, 116 Wn. App. at 689.

Here, in contrast, the only evidence of Taua's level of intoxication was his own testimony. None of the other witnesses testified that he appeared intoxicated to them, and the store's surveillance video did not show Taua stumble or lose his balance at any point. There was no evidence that he was slurring his speech or that he vomited from consuming too much alcohol. He did not testify that he experienced a "blackout" or that his drinking affected his memory of what happened. Indeed, he testified in detail to his version of what happened on his second night at the 7-Eleven. At no point did he testify that he drank so much he was not aware of what he was doing or that he did not intend to take things from the store. In fact, he openly admitted to stealing money and beer. The only evidence regarding his mental process at the time suggested he was acting intentionally, out of anger. For example, when asked why he stole the money, he responded, "Maybe I was mad. . . . I was not in my right mind at that time. I was mad." VRP at 336. Based on this record, there was not substantial evidence that Taua's mind or body was so affected by alcohol that he could not form the intent to deprive his victim of property. And declining to seek an inapplicable instruction is not deficient performance.

But even assuming Taua was entitled to a voluntary intoxication instruction, his attorney's failure to request such an instruction did not prejudice him because there is not a reasonable probability that it affected the trial's outcome. There was overwhelming evidence that Taua robbed the 7-Eleven store on both November 6 and 7, 2008. His actions were recorded by the store's video surveillance system and played for the jury several times during the trial. Both store clerks testified that Taua

assaulted them without provocation and stole money, cigarettes, and beer from the store. Taua claimed he acted in self-defense, but he admitted that he stole money and beer. His explanation was not that he was so intoxicated he acted unintentionally, but rather that he was "mad." Under these circumstances, Taua fails to establish that his attorney's failure to request the instruction prejudiced him.

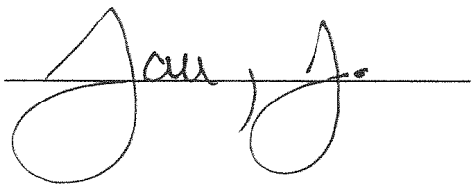
In his statement of additional grounds for review, Taua puts forward two additional ineffective assistance arguments. First, he contends that during plea negotiations, the State incorrectly calculated his offender score as six instead of four and that his attorney failed to correct this error despite his pointing it out and expressing his willingness to plead guilty based on an offender score of four. But the record does not support this version of events. At one point, Taua complained to the court because he disagreed with his attorney's decision not to call a particular witness. But he made no mention of any dispute regarding his offender score until after his conviction. And at his sentencing hearing, Taua insisted that his offender score was actually zero, despite the State's submission of a certified copy of his judgment and sentence for a prior assault conviction.[2] Because Taua's argument is premised on matters not supported by the record, we decline to consider it further. RAP 10.10(c).

Second, Taua contends that his attorney was ineffective because he did not

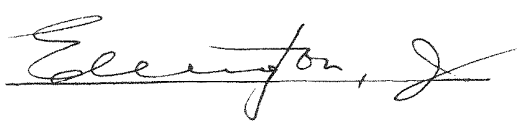
[2] Apparently, the State at one point alleged that his offender score was five rather than four based on a California conviction for taking a motor vehicle without the owner's consent. But at sentencing, it had not been able to locate a certified judgment and sentence for that prior crime, so it reduced its offender score calculation by one point.

move to exclude Isaac Hoffman as a witness. Hoffman was one of the 7-Eleven customers who called 911 after the robbery. Taua asserts that he was an "inadmissible witness" because the State failed to timely disclose him as a potential witness in its "pre-trial memorandum of state witnesses list." But this document is not part of the record, and Taua's bare assertion that the witness was not timely disclosed is insufficient to establish this as a fact.[3] If matters outside the record are challenged, they must be raised in a personal restraint petition. McFarland, 127 Wn.2d at 335. Even assuming that the State was late in disclosing this potential witness, Taua does not establish that an objection from his attorney would have resulted in the witness's exclusion as a remedy or, even if the witness had been excluded, that there is a reasonable probability it would have affected the trial's outcome.

Because Taua fails to demonstrate deficient performance or prejudice for any of his ineffective assistance claims, we affirm.



WE CONCUR:



[3] The only similar document that is part of the record is the "State's Trial Memorandum," which did list Hoffman as a potential witness.